



The Senate of Texas

Judith Zaffirini

State Senator, District 21

December 22, 1997

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GOVERNMENTAL INQUIRY

UNIT

Chair, Health and Human Services

Education

Finance

The Honorable
Dan Morales
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

Attention: Opinion Committee

Dear General Morales:

This is to request an opinion pursuant to Section 402.042 of the Texas Government Code.

FACTS

Vernon Warren, Chief Appraiser of Atascosa County, was indicted by the Atascosa County Grand Jury on or about September 13, 1993, for conduct alleged to have occurred in 1992. The offense alleged was a Class "A" misdemeanor described as "official misconduct." The indictment alleged wrongdoing as follows:

"...V.T.C.A., Tax Code Sec. 23.55 provides that the chief appraiser makes the determination that change in use of 'qualified open-space land' has occurred. Section 23.55 also provides that the chief appraiser shall deliver a notice of the determination to the owner of the land as soon as possible after making the determination. Vernon Warren determined that there had been a change in use of 'qualified open-space land' owned by [the complaining witnesses]. Vernon Warren did not deliver a notice of that determination to [the complaining witnesses] as soon as possible after making that determination."

The Atascosa County Appraisal District Board of Directors met on Jan. 27, 1994, and voted in favor of a motion to pay Mr. Warren's attorney's fees contingent upon a determination of the legality of the payment. The Atascosa County District

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FILE # ML-40001-98 Opinion Committee
I.D. # 40001

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Attorney informed a member of the board that the payment could be illegal. Once that board member informed the Atascosa County Appraisal District of this opinion, Mr. Warren paid his own attorney's fees.

Procedurally, on or about Jan. 27, 1994, Mr. Warren filed a First Amended Motion to Quash the indictment, which the District Court granted. In an order issued on or about Aug. 16, 1995, the Fourth Court of Appeals reinstated the indictment and ordered the cause tried.

The case was then tried before the district court on April 16, 1996. At the conclusion of the State's evidence, the court granted the defense motion for a directed verdict in Mr. Warren's favor.

However, Mr. Warren's employment contract with the Atascosa County Appraisal District Board of Directors expired on or about December 31, 1995, after which Mr. Warren ceased to be associated with, or employed by, the Appraisal District. Therefore, a significant amount of Mr. Warren's costs and attorney's fees were incurred after he left employment as Chief Appraiser of Atascosa County.

QUESTIONS

Please provide an opinion regarding the following questions:

1. May the Atascosa County Appraisal District Board of Directors vote to pay all or some of the costs and attorney's fees incurred by Mr. Warren during the litigation described?
2. If not, is a governing body of a political subdivision of the State of Texas, and in particular the Board of Directors of an Appraisal District, authorized to enact a policy that states as follows:

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**"PAYMENT OF ATTORNEY'S FEES INCURRED IN LITIGATION
ARISING FROM PERFORMANCE OF OFFICIAL DUTIES:**

This provision is applicable to the following personnel associated with the Atascosa County Appraisal District:

Members of the Appraisal District Board of Directors

Members of the Appraisal Review Board

The Chief Appraiser

All employees of the District, including temporary or part-time employees.

Should any of the above referenced personnel become a Defendant in any civil or criminal litigation which is brought against them pursuant to the lawful performance of their official duties for the Atascosa County Appraisal District, it shall be the policy of the Atascosa County Appraisal District to assume liability for, and to pay each affected person's attorney's fees incurred in defending said litigation. The selection of an attorney to defend affected personnel shall be left wholly to the discretion of the Appraisal District Board of Directors.

This policy shall not be applicable with respect to matters in which the employee willfully engages in conduct prohibited by law, regulation, or by policy or directive of the Atascosa County Appraisal District or its board of directors.

This policy shall also not apply to employees who, although named as defendants in a civil suit, shall file a cross-action, counterclaim, or other claim against the party filing the suit or any claim against the Atascosa County Appraisal District."

3. Is such a "policy" required, or is an Appraisal District Board of Directors authorized to make the determination to pay legal costs and attorney's fees as a matter of discretion?

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4. Is there any distinction to be made between an agreement to pay legal costs and attorney's fees in a civil case as opposed to a criminal action?
5. Must the policy, if valid, have been adopted before the civil or criminal action was filed?
6. If the costs and attorney's fees were originally incurred and paid by an individual purportedly covered by the policy, is the Board of Directors authorized to now vote to reimburse the person for those costs and attorney's fees?
7. Would it make any difference to your opinion if the facts were as follows?:
 - (a) the Board of Directors voted to pay the person's attorney's fees before some of the fees were incurred contingent upon obtaining a determination regarding the legality of such payments;
 - (b) but before any payments were made, a member of the Board inquired of the Atascosa County District Attorney if such action would be illegal, and the District Attorney's oral response was that it well could be;
 - (c) thus, no payments were made because of the interpretation of the oral opinion of the District Attorney.
8. Would your opinion differ if the individual sued or indicted eventually prevailed or was found not guilty?
9. May an individual purportedly covered by the policy be reimbursed for costs and attorney's fees incurred in defending against the litigation after the person leaves employment or service with the Appraisal District?

BRIEF ANALYSIS

A brief analysis of the facts particular to this case suggests the following:

1. In light of the current penchant for "nuisance litigation" (for example, the "liens" and "court documents" filed or issued by the "Republic of Texas" people) and the general increase in societal litigiousness, the question exists as to whether these issues should be reviewed. This would seem to be of particular concern to persons employed by taxing authorities, who, because of the process itself, frequently find themselves in disputes arising from the performance of their official duties. These situations can occasionally lead to personal and political animosity or "spite" litigation without any fault whatsoever of the public employee or official.
2. Assuming that Atascosa County Appraisal District is authorized to "employ attorneys to defend officers and employees...in situations where legitimate interests of the governmental entity to employ counsel...require the assertion of a vigorous legal defense on behalf of the public interest" (see AG Opinion No. DM-107 at p. 537 (April 20, 1992)), it appears that the peculiar circumstances of this case do authorize the District to reimburse Mr. Warren for his legal expenses following the conclusion of the litigation.
3. I request a clarification of the conclusion in DM-107--that an employee may not be reimbursed after legal expenses have been incurred--in light of the fact that the Board of Directors voted to pay Mr. Warren's attorney's fees in Jan. 1994 "contingent upon the legality of payment", but thereafter refrained from doing so solely because the District Attorney warned that such action could be illegal.

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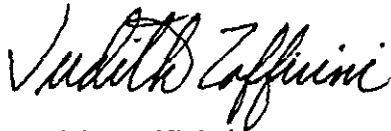
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I look forward to receiving your response to this request. Feel free to contact me if I can provide additional information.

May God bless you.

Very truly yours,

A handwritten signature in cursive script, reading "Judith Zaffirini". The signature is written in dark ink and is positioned above the printed name.

Judith Zaffirini

JZ/ps

XC: George Harris, Chair, Atascosa County Appraisal District